

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HELEN LEWIS

Claimant

VS.

ALORICA, INC.

Respondent

AND

UNITED STATES FIRE INS. CO.

Insurance Carrier

Docket No. 1,035,946

ORDER

Respondent and its insurance carrier (respondent) request review of the November 5, 2006 preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders.

ISSUES

The Administrative Law Judge (ALJ) found the claimant's current neck condition is related to her work with respondent and authorized Dr. Fritz to treat claimant. The ALJ also ordered temporary total disability at a rate of \$253.30 beginning April 9, 2008 until the claimant is released to return to work under her restrictions or is found to be at maximum medical improvement or until further order. As justification for her Order, the ALJ stated as follows:

Claimant has a long history of work-related injuries. A lot of medical evidence has been presented and considered. Dr. Fritz and Dr. Veloor are both of the opinion that Claimant's current neck complaints were either the result of her work with Respondent or the work hardening program claimant underwent at Respondent's direction.¹

¹ ALJ Order (Nov. 5, 2006) at 1-2.

The respondent requests review of this decision alleging that claimant's present neck complaints are causally related to an earlier work injury. Moreover, respondent asserts that claimant's credibility is so compromised that the ALJ should have concluded that claimant had failed to establish any work-related injury whatsoever, either while working or during her treatment for her alleged elbow injury. Alternatively, respondent suggests that it be allowed to designate the authorized treating physician.

Claimant argues that the ALJ should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant was an employee of respondent's hired to work as a telephone customer service agent. This job required her to sit for extended periods of time while speaking to customers and inputting information into the computer. In July 2007, claimant injured her right elbow while working.² Treatment was provided with Dr. Steven Hendler and while she also complained about neck problems, he did not attribute them to her work activities. Rather, he believed those were due to her earlier neck surgery. When claimant pressed the issue of additional treatment, a preliminary hearing was held. Claimant contends she either hurt her neck while working or during the work hardening program she was ordered to complete.

At the first preliminary hearing respondent did not deny treatment for claimant's right elbow complaints. But, as for any neck complaints and claimant's request for treatment, respondent refused to voluntarily comply. That same defense is in play in this second preliminary hearing. Claimant seeks additional medical treatment for her neck complaints alleging either an original injury arising out of her work activities or, in the alternative, that her work hardening program caused a new injury or an aggravation of her underlying injury.

Respondent's primary defense has centered upon the fact that claimant sustained an earlier compensable injury in 2005 for which she received a significant amount of medical treatment, including a fusion to her cervical spine followed by a monetary settlement based upon a whole body functional impairment. Respondent has also made it quite clear in its brief that it views claimant as untruthful both in terms of the consistency of her complaints, their causal connection to her work activities as well as in her recitation of events and symptoms to the various physicians she has seen over the course of this claim. Simply put, respondent adamantly maintains claimant is inconsistent and untruthful and any and all complaints she has, to the extent they are credible, are attributable to her 2005 accident.

² P.H. Trans. (June 4, 2008) at 8.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.³ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁴

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁵

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.⁶ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.⁷ Moreover, an injury that occurs during physical therapy is compensable as well as a natural and probable result of the underlying injury.⁸

Here, the ALJ concluded that the greater weight of the evidence supported claimant’s assertion that her neck complaints were caused by her work activities. After a complete review of the record, as presently developed, this Board Member agrees. While it is true that claimant is somewhat evasive when answering questions and her prospects of success are, at least in Dr. Jackson’s view, questionable, the undeniable fact is that claimant had an elbow injury for which she was referred to Dr. Hendler for treatment. Dr. Hendler referred claimant for work hardening. Claimant’s neck complaints increased significantly during the work hardening and radiological studies have revealed additional injury. Although Dr. Hendler does not believe there is a new neck injury, both Drs. Fritz and Dr. Veloor have opined to the contrary. Even Dr. Jackson, who examined claimant at respondent’s request, does not deny the surgery is necessary, but opined that it would

³ K.S.A. 2007 Supp. 44-501(a).

⁴ K.S.A. 2007 Supp. 44-508(g).

⁵ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991), *rev. denied* 249 Kan. 778 (1991).

⁶ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁷ *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

⁸ *Frazier v. Mid-West Painting, Inc.*, 268 Kan. 353, 995 P.2d 855 (2000).

unlikely improve her functional status or quality of life, therefore he declined to recommend surgery until the claimant decides to give up her pursuit of disability and commit herself to improving her functional status.

For these reasons, the ALJ's preliminary hearing Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁹ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated November 5, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2009.

JULIE A.N. SAMPLE
BOARD MEMBER

c: James E. Benfer, III, Attorney for Claimant
D'Ambra M. Howard, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge

⁹ K.S.A. 44-534a.